COPY

FILED
NOV 4 1954
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 351

LOUISIANA PUBLIC SERVICE COMMISSION,
Appellant,

versus

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the Eastern District of Louisiana.

REPLY TO MOTIONS TO AFFIRM.

FRED S. LeBLANC,
Attorney General, State of Louisiana;
JOEL B. DICKINSON,
Assistant Attorney General,
State of Louisiana;
ROBERT A. AINSWORTH, JR.,
Attorney for Louisiana Public Service Commission, Appellant;
W. CROSBY PEGUES, JR.,
For the Department of Highways, State of Louisiana, Intervening Plaintiff;
PAUL G. BORRON, JR.,
For American Sugar Cane League of the U. S. A., Inc., Intervening Plaintiff;
LOUIS A. SCHWARTZ,
For New Orleans Traffic and Transportation Bureau and American Turpentine and Tar Company, Intervening Plaintiffs, and American Sugar Cane League of the U. S. A., Inc., Intervening Plaintiff.

ROBERT A. AINSWORTH, JR.,
1650 National Bank of Commerce Building,
New Orleans, Louisiana,
Of Counsel for Appellant.

SUBJECT INDEX.

	Page
Statement	2
Facts of the Case	2
Prior History of the Case	3
The Issues Involved	7
Argument	8
Universal Camera Corp. Pursued Through Shepard's Citations	13
The Mississippi Decision	20
Conclusion	24
Appendix I	27
Appendix II	45

TABLE OF AUTHORITIES.

Florida v. United States, 292 U. S. 1	18
Interstate Commerce Act, Sections 13(3) and (4) of part I (Title 49 U. S. C. A., Section 13(3) and (4)	3
Illinois Commerce Commission v. United States, 292 U. S. 474	18
272 I. C. C., 695, decided December 29, 1948, and 276 I. C. C., 9, decided August 2, 1949	3

TABLE OF AUTHORITIES—(Continued).

	Page
280 I. C. C., 179, decided March 12, 1951, 281 I. C. C., 557, decided August 2, 1951, and 284 I. C. C., 589, decided April 11, 1952	3
284 I. C. C., 467	4
King v. United States, 344 U. S. 254, 73 Sup. Ct. 259 (1952)	14
Louisiana Constitution of 1921, Article VI, Sections 3-9	2
Mississippi Valley Barge Co. v. United States, 292 U. S. 282	18
Mississippi Public Service Commission v. U. S., and I. C. C., Civil Action No. 2120	20
North Carolina v. United States, 325 U. S. 507, 65 Sup. Ct. 1260 (1945)	14
Ohio v. United States, 292 U. S. 498	18
Radio Corp. of America v. United States, 341 U. S. 412, 71 Sup. Ct. 806, 807 (1951)	12, 18
Title 28, U. S. C. A., Sections 1336, 1398, 2284, 2321-25	2
Title 49, U. S. C. A., Section 17(9)	2
Title 5, U. S. C. A., Sections 1001-1009	2
Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 71 Sup. Ct. 456, decided February 26, 1951	7
28 U. S. C. A., Sections 1253 and 2101(b)	2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 351

LOUISIANA PUBLIC SERVICE COMMISSION,
Appellant,

versus

UNITED STATES OF AMERICA and the
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the Eastern District of Louisiana.

REPLY TO MOTIONS TO AFFIRM.

Appellants, Louisiana Public Service Commission; Department of Highways, State of Louisiana; New Orleans Traffic and Transportation Bureau; American Turpentine and Tar Company, and American Sugar Cane League of the U. S. A., Inc., pursuant to Rule 16 (3) of the Revised Rules of this Court, herewith reply to the motions to affirm of intervening defendants and appellees, the named railroad companies, and the United States of

America and the Interstate Commerce Commission, and aver that said motions should be overruled and the case be permitted to go to oral argument before the entire Court.

STATEMENT.

The notice of appeal and jurisdictional statement, as amended, contain an outline of points and issues raised by appellants in the lower court. Jurisdiction of this court to review the judgment and decree complained of is conferred by statutory provisions.(1)

Suit was brought in this case under the provisions of *Title 28, U. S. C. A., Sections 1336, 1398, 2284, 2321-25; Title 49, U. S. C. A., Sections 17 (9)*, and *Title 5, U. S. C. A., Sections 1001-1009.*

The motion to affirm is filed under the provisions of Rule 16, Paragraph 1 (c) of the Revised Rules of this court, which provide only for a case where "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument".

FACTS OF THE CASE.

Plaintiff, Louisiana Public Service Commission, an agency of the State of Louisiana,(2) brought this action

(1) 28 U. S. C. A. Sections 1253 and 2101 (b).

(2) Louisiana Constitution of 1921, Article VI, Sections 3-9, inclusive, providing that all necessary power and authority is reposed in said Commission to govern, regulate and control common carrier railroads operating within the State of Louisiana and to fix reasonable and just rates and charges for the commodities furnished or services rendered.

on April 28, 1954 against defendants to enjoin, annul and set aside the report of the Interstate Commerce Commission dated January 5, 1954 and the order of said Commission dated April 5, 1954 in Docket No. 31,163 entitled, **"Louisiana Intrastate Freight Rates and Charges"**. The Department of Highways, State of Louisiana; New Orleans Traffic and Transportation Bureau; American Turpentine and Tar Company and American Sugar Cane League of the U. S. A., Inc. intervened as plaintiffs in support of the complaint.

The Interstate Commerce Commission, in Docket No. 31,163, by its order dated December 4, 1952, entered upon an investigation[3] to determine whether intrastate rates and charges of rail common carriers operating in Louisiana cause any undue or unreasonable advantage or preference between persons or localities in intrastate commerce and in interstate commerce or any undue or unreasonable discrimination against interstate commerce, and if so what the rates and charges should be to remove the unlawfulness.

PRIOR HISTORY OF THE CASE.

The Interstate Commerce Commission in its so-called *Ex Parte* 168[4] and *Ex Parte* 175[5] granted certain percentage increases in interstate freight rates in the nation generally.

---

(3) Pursuant to the Interstate Commerce Act, particularly Sections 13 (3) and (4) of Part I (Title 49 U. S. C. A., Section 13 (3) and (4)).

(4) 272 I. C. C. 695, decided December 29, 1948, and 276 I. C. C. 9, decided August 2, 1949.

(5) 280 I. C. C. 179, decided March 12, 1951, 281 I. C. C. 557, decided August 2, 1951, and 284 I. C. C. 589, decided April 11, 1952.

Following the general freight increases in *Ex Parte* 168, the Louisiana Public Service Commission, after a full hearing **before the members of the Commission themselves,** authorized comparable increases of 8% in intrastate freight rates in Louisiana exempting, however, certain commodities from the increases. The principal rail carriers in Louisiana (the same as filed the motion to affirm) filed a petition with the Interstate Commerce Commission under the provisions of Section 13 (4) of Part I of the Interstate Commerce Act, seeking to remove the exemptions in the Louisiana Commission's order. On February 15, 1952 the Interstate Commerce Commission, 284 I.C.C. 467, handed down its decision upholding the Louisiana Commission as to most of the commodities involved including the principal commodities involved in the present case.[6]

Following the general freight increases authorized by the Interstate Commerce Commission in *Ex Parte* 175, the Louisiana Public Service Commission, after full hearing **before the members of the Commission themselves,** granted the petition of the principal rail carriers in Louisiana and authorized comparable increases of 15% in Louisiana intrastate freight rates but exempted certain commodities from its order, including most of the same commodities which were exempted in the prior proceeding.

---

(6) 284 I. C. C. 467. Commodities on which the Louisiana Public Service Commission was upheld included: Brick, common building or face, and hollow building tile in Louisiana east of the Mississippi River; cattle-feed, consisting of not less than 65% of cottonseed meal and cottonseed hulls or soybean meal, in carloads; cottonseed and cottonseed cake, meal, and hulls in Louisiana east of the Mississippi River; soybeans and soybean cake or meal, in carloads in Louisiana east of the Mississippi River; sand, gravel and related commodities, including asphalt-coated rock and gravel; sugar, raw and refined, and sugarcane.

Then followed another petition by the principal rail carriers in Louisiana to the Interstate Commerce Commission under the provisions of Section 13 (4) of Part I of the Interstate Commerce Act seeking to remove the exemptions which were granted by the Louisiana Commission in both proceedings and which resulted in the Interstate Commerce Commission's order of December 4, 1952 in Docket No. 31,163 entering upon this investigation.

The Interstate Commerce Commission sent **its Examiner** Vandiver to Baton Rouge, Louisiana for the hearing on February 24-27, 1953, and he sustained practically *in toto* the petition of the rail carriers, despite strenuous objection by the Louisiana Commission and other interested parties and shippers.

The Examiner held that establishing the increases on intrastate freight rates, which he recommended, would increase the rail carriers' revenues by more than $1,900,000 annually.

Exceptions to the Examiner's report were filed, and on January 5, 1954 the Interstate Commerce Commission approved the findings of Examiner Vandiver in full and substantially adopted practically the identical language of his report as its own.

Thus, although the Interstate Commerce Commission had previously upheld the Louisiana Commission with respect to the exemptions granted these commodities from

the effect of the *Ex Parte* 168 increases, in its subsequent order in Docket No. 31,163 the Commission, in effect, rescinded its prior order, and the rail carriers were ordered to establish on May 17, 1954, freight rates reflecting both the *Ex Parte* 168 and *Ex Parte* 175 increases.

Commissioner Freas dissented from the entire report. Commissioner Clark dissented in part, particularly to the extent that he could not agree that increased rates should be prescribed on sugar and sugar cane, and was joined in this dissent by Commissioners Alldredge and Knudson.

Application of the Louisiana Commission for rehearing was denied, and the order of the Interstate Commerce Commission became effective May 17, 1954 increasing intrastate freight rates on many important commodities.(7)

Trial of this case on the record made before the Interstate Commerce Commission was held before the three-judge federal district court on June 5, 1954, and on July 12, 1954 the court dismissed the suit.(8)

---

(7) Commodities and percentages of increases are: Asphalt, 15%; Asphalt-coated rock, sand and gravel, 8% plus 15%; Bagasse, 15%; Brick, common building or face, hollow building tile, 15% (plus 8% if moving east of the Mississippi River); Cement, 15%; Clay and shale cinders, 9%; Cottonseed, cottonseed cake, meal and hulls, 15% (plus 8% if moving east of the Mississippi River); Cottonseed bran, 8% plus 15%; Molasses, 9%; Petroleum products, 9%; Sand, gravel and related commodities, 8% plus 12%; Soybeans, soybean cake and meal, 15% (plus 8% if moving east of the Mississippi River); Sugar, raw and refined, and sugarcane, 8% plus 15%; Sulphur and sulphuric acid, 9%; Tarwood or waste wood 15%.

(8) Said decision, unreported, is reproduced in full in the appendix to jurisdictional statement.

THE ISSUES INVOLVED.

The issues may be summarized in the—

1.

Failure of the District Court to apply properly the principle of *Universal Camera Corp. v. National Labor Relations Board*[9] relative to the responsibility of the court under the Administrative Procedure Act to determine the substantiality of evidence supporting the Interstate Commerce Commission decision from the record as a whole; and imposing a duty and obligation on the Court to review all of the evidence in order to decide whether the Interstate Commerce Commission decision is supported by substantial evidence.

2.

Failure of the District Court to review the record as a whole and to declare that there is no substantial evidence in the record before the Interstate Commerce Commission sufficient to justify a holding that: (a) present Louisiana intrastate rates on the involved commodities are abnormally low or fail to produce their fair share of revenue or unjustly discriminate against interstate commerce; or (b) that present Louisiana intrastate rates on sand and gravel and on sugar give undue and unreasonable advantage and preference to intrastate shippers and subject interstate shippers to undue and unreasonable prejudice and disadvantage.

3.

Failure of the District Court to hold that the proposed increases in Louisiana intrastate freight rates un-

(9) 340 U. S. 474, 71 Sup. Ct. 456, decided February 26, 1951.

der the Interstate Commerce Commission decision will not result in increases in revenue to the rail carriers but will actually cause a loss because of diversion of the traffic to motor and water carriers.

4.

The issues involved are substantial.

ARGUMENT.

1.

The District Court has either failed to understand the principle of *Universal Camera Corp.*, supra, or has misapplied it. Here the District Court failed to follow the admonition that it should not abdicate the judicial function in reviewing the decision of an administrative tribunal such as the Interstate Commerce Commission.

Universal Camera Corp., supra, correctly interpreted the Administrative Procedure Act,[10] wherein it is stated in the last sentence of the cited section:

> "In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." (Effective June 11, 1946).

The Administrative Procedure Act and the provisions thereof relating to judicial review resulted from a longfelt need expressed to the members of Congress in the committee hearings, for a stricter review of decisions of administrative tribunals, many persons feeling that

(10) 5 U. S. C. A. Section 1009.

there had been a trend toward abuse of discretion in these bodies.

The court, in *Universal Camera Corp.*, said:[11]

"The very smoothness of 'the substantial evidence' formula as the standard for reviewing the evidentiary validity of the Board's findings established its currency. But the inevitably variant applications of the standard to conflicting evidence soon brought contrariety of views and in due course bred criticism."

The Court said further (p. 464):

"From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision. The other is that now Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof."

* * * * * *

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes

(11) 71 Sup. Ct. 459.

such a theory of review and bars its practice. *The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.* This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrates that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment." Reading again from the cited case, the Court said, (p. 465): *"Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.'* (Emphasis ours).

"A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry."

* * * * * *

"Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more

helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms."

* * * * * *

"But a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in. The legislative history of these Acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized." (Emphasis ours).

On page 466 of the Reporter, the Court concludes with the following important holding:

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court

of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." (Emphasis ours).

The only reference or discussion of the evidence to be found in the entire opinion of the district court in this case is in the two last paragraphs thereof[12] which we quote:

> "We have considered the entire record, which comprises nearly one thousand pages of testimony and a great number of exhibits. *In the belief that no useful purpose would be served by our reviewing the record here we shall not do so.* It is sufficient to say that the Commission had before it a large volume of substantial evidence adduced by both sides of the controversy. In reaching its conclusions it was necessary for the Commission to weigh the evidence. That was a function which peculiarly addressed itself to the expertise of the Commission.
>
> "We hold that the order complained of has a rational basis in adequate findings, which are supported by substantial evidence." (Emphasis ours).

There is no analysis whatsoever in the present case of *any* of the evidence of record. All that may be fairly

(12) Compare that with what was said in **Radio Corp. of America v. United States**, 341 U. S. 412, 71 Sup. Ct. 806, 807 (1951) where this court, discussing the district court opinion, said "Both the majority and dissenting opinions show a familiarity with R. C. A.'s basic contention (and the minor ones as well) that could have come only from careful study of the record as a whole."

obtained from a reading of these two paragraphs of the district court opinion is that it considered the Interstate Commerce Commisison to be expert, that it felt that the Commission alone had the function of weighing the evidence, and, therefore, its decision should be affirmed. But this is not the rule of law. The duty of weighing all the evidence is imposed on the courts in *Universal Camera Corp.*, supra, as the decision holds.

Congress, following the recommendations of the Attorney General's Committee required that the evidence be weighed on the record as a whole to determine its substantiality. That is why the last sentence of Section 1009 of the Administrative Procedure Act was inserted so that the courts might fairly follow the legislative requirement of a full judicial review in the future of administrative decisions and the evidence supporting them.

The district court opinion in this case reflects a failure on the part of the court to follow the clear provisions of the Administrative Procedure Act.

UNIVERSAL CAMERA CORP. PURSUED THROUGH SHEPARD'S CITATIONS.

The provisions of the Administrative Procedure Act relating to judicial review of administrative decisions became effective on June 11, 1946. It was not until February 26, 1951, in *Universal Camera Corp.*, supra, that a landmark interpretation of these provisions of the Act occurred. But there have been many examples thereafter of a faithful adherence to these principles. These are found principally in the decisions of the several United States Courts of Appeal. The Courts of Appeal which

have jurisdiction under the acts of Congress to review the appeals of many administrative tribunals (but not the Interstate Commerce Commission) have given life to the Administrative Procedure Act and the principle of *Universal Camera Corp.*, supra, and have not hesitated to review the evidence on the record as a whole. Where they felt it proper to do so the Courts of Appeal have declared many board and administrative tribunal decisions null because not supported by substantial evidence. Abstracts of these decisions are set forth in the Appendix to this reply.

NORTH CAROLINA v. U. S.[13]—KING v. U. S.[14]

In the *North Carolina* case this court said, "it would be helpful to set out certain guiding principles relative to the indispensable prerequisites to the exercise of the Federal Commission's power over intrastate rates." The court observed that as to interstate regulation the Commission has been granted the broadest powers to prescribe rates but further stated that neither Section 13 (4) of the Interstate Commerce Act, nor any other congressional legislation, indicates a purpose to deprive the states of their primary authority to regulate *intrastate* rates, that a state's power over intrastate rates is exclusive up to the point where its action would bring about the prejudice or discrimination prohibited by the section. The Supreme Court said (p. 1263):

> "Intra-state transportation is primarily the concern of the state. The power of the Interstate Commerce Commission with reference to such intra-

(13) 325 U. S. 507, 65 Sup. Ct. 1260 (1945).
(14) 344 U. S. 254, 73 Sup. Ct. 259 (1952).

state rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. American Express Co. v. South Dakota, 244 U. S. 617, 625, 37 S. Ct. 656, 660, 61 L. Ed. 1352. A *scrupulous* regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet '*a high standard of certainty.*' *Illinois Central Railroad Co. v. Public Utilities Commission*, 245 U. S. 493, 510, 38 S. Ct. 170, 176, 62 L. Ed. 425. Before the Commission can nullify a state rate, justification for the '*exercise of the federal power must clearly appear.*' *Florida v. United States*, 282 U. S. 194, 211, 212, 51 S. Ct. 119, 123, 124, 75 L. Ed. 291. See also *City of Yonkers v. United States*, 320 U. S. 685, 64 S. Ct. 327, 88 L. Ed. 400. And the intention to interfere with the state's rate-making function is not to be presumed, *Arkansas Commission v. Chicago, etc., R. R.*, 274 U. S. 597, 603, 47 S. Ct. 724, 726, 71 L. Ed. 1224; nor must its intention in this respect be left in serious doubt. *Illinois Commission v. Thompson*, 318 U. S. 675, 684-685, 63 S. Ct. 834, 838, 87 L. Ed. 1075. The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intra-state rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission." (Emphasis ours).

* * * * * *

"In effect, the Commission's holding was, and its argument is here, that Section 13 (4) automatically requires complete uniformity in intra-state and interstate rates. That argument is in short that under our national transportation system interstate travelers and intra-state travelers use the same trains; for a state to fix a lower intra-state rate than the interstate rate is therefore an undue advantage to the intrastate passengers and an unfair discrimination against the interstate passengers. If Congress intended to permit such an over-simplified form of proof to establish 'unjust discrimination', then its requirement of a 'full hearing" was mere surplusage. In fact, it need have provided for no hearing at all since it could have easily stated in its legislation that intra-state rates shall never be lower than interstate rates. The argment of the Commission in this regard runs counter to the language of Section 13 (4), and would call for a declaration by us that Congress intended by this section to reverse the entire transportation history of the nation." (Emphasis ours).

The Court further observed (p. 1265):

"But the question posed by the Commission's conclusion was whether the particular North Carolina railroads were obtaining from North Carolina's intra-state passenger rates their fair part of such funds as were required to enable these particular railroads to render adequate and efficient service. The Commission made no findings as to what contribution from intra-state traffic would constitute

a fair proportion of the railroad's total income. It made no finding as to what amount of revenue was required to enable these railroads to operate efficiently. Instead, it relied on the mere existence of a disparity between what it said was a reasonable interstate rate and the intra-state rate fixed by North Carolina."

And finally the Court said (p. 1267):

"The power of the Commission to require states to raise their intra-state rates depends upon whether intra-state traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property directed to the transportation service both interstate and intra-state."

There is nothing in *King v. United States* to indicate that the principles set forth in the North Carolina case have been reversed or modified. This Court declined in the *King* case to uphold the findings of the Florida Railroad Commission and sustained the findings of the Interstate Commerce Commission in a 13th Section review thereof only from the record itself and the evidence. It said (p. 269): "No question has been raised here as to the adequacy of the evidence upon which any of the findings are based. Although no such point is urged, supporting evidence appears in the record of the 'full hearing' under Section 13 (4), all of which was introduced in evidence in the court below."

In the instant case, the primary question raised by this appeal is the adequacy of the evidence upon which

the findings are based. Here, the decision of the Interstate Commerce Commission is not fairly supported by substantial evidence viewing the record as a whole. Applying the *Universal Camera Corp.* principle and giving it effect, without abdicating the judicial function, and reviewing the record as a whole, the answer is inescapable that the Interstate Commerce Commission did not have a scrupulous regard for maintaining the power of the state commission, did not require a high standard of certainty in the proof by the rail respondents, and that justification for the exercise of its authority did not clearly appear.(15)

Rail interveners in their motion to affirm cite *Ohio v. United States*, 292 U. S. 498, *Mississippi Valley Barge Co. v. United States*, 292 U. S. 282, *Florida v. United States*, 292 U. S. 1, and *Illinois Commerce Commission v. United States*, 292 U. S. 474. All of these cases were decided in the year 1934 *prior to the passage of the Administrative Procedure Act* and prior to the *Universal Camera Corp.* decision. Their usefulness is, therefore, seriously subject to question.

2.

There is no substantial evidence in the record to justify the finding that present Louisiana intrastate rates on the involved commodities are abnormally low or fail to produce their fair share of revenue. The average rate of

(15) Compare also Justice Frankfurter's dissent in **Radio Corp. of America v. U. S.**, 341 U. S. 412, 71 Sup. Ct. 806, 811 (1951), in which he said: "But so long as the Congress has deemed it right to subject the orders of the Commission to review by this court, the duty of analyzing the essential issues of an order cannot be escaped by too easy reliance on the conclusions of a district court or on the indisputable formula that an exercise of discretion by the Commission is not to be displaced by a contrary exercise of judicial discretion."

return in 1951 of the railroads serving Louisiana was 4.89%.[16] Using the Interstate Commerce Commission rate base and increasing this rate of return, as the rail witness said should be done, by 6-1/2%, the rate of return is 5.20% as compared with the national average of 4.2%. Shippers in Louisiana are, therefore, making a larger contribution to the carrier's revenue than average shippers throughout the United States. There was no separation made in the proof in this case by the railroads of their revenues, expenses and properties as between interstate and intrastate operations. As stated in the Mississippi case, (to which we will fully refer hereafter) "So far as the record shows, it could be fairly assumed that the rates fixed by the . . . Commission were not abnormally low but were bearing a fair percentage of revenue for the operation of the carriers." And as further observed in the Mississippi case, and as is true here in the Louisiana case, "There is no testimony in the record having probative force showing that the rates in Mississippi were abnormally low other than the disparity that exists between the interstate rates and the intrastate rates which within itself is not sufficient. Different conditions, circumstances and situations in different states require and justify different results in fixing intrastate rates."

No attempt was made by rail respondents in the evidence in this case to show discrimination between persons and localities in interstate commerce, except as to the commodities sand and gravel, and sugar. As to these the evidence not only failed to show discrimination but the record as a whole completely refutes this meager evi-

(16) Witness Kroll, Exhibit No. 3.

dence. It cannot be fairly said that there is any substantial basis for a finding of discrimination.

THE MISSISSIPPI DECISION.

While the present case from Louisiana has been litigated, there has also been what amounts to a companion case in the State of Mississippi likewise being litigated. It is entitled, "*Mississippi Public Service Commission v. U. S. and I. C. C.*, Civil Action No. 2120." On September 21, 1954 the district court rendered a decision setting aside the order of the Interstate Commerce Commission entered under Section 13 of the Interstate Commerce Act, where as here the Mississippi Commission had declined the *Ex Parte* 175 increases on all commodities in that state. The decision is so important and so much in point that we have copied it in full in the appendix hereto. It involves many of the same commodities which are involved in the present case, such as cottonseed, soy beans, fertilizer, pulpwood, sand and gravel, cement, brick, and refined petroleum in tank cars.

Undoubtedly it will be appealed by defendants. This court may therefore have the opportunity of determining both the Mississippi and Louisiana cases in this term of Court. It would seem logical that both might be argued orally before this Court on the same date. Up to now the principal differences in the cases are found only in the fact that the State of Mississippi prevailed in the district court, whereas the State of Louisiana did not.

3.

The proposed increases in Louisiana intrastate freight rates would cause a decrease in revenues to the

railroads rather than an increase because of diversion of traffic to motor and water carriers. The Examiner contends that there will be an increase in revenues to the rail carriers of $1,900,000 annually, and the Commission found that it would amount to $1,700,000 annually. But examine the evidence. It is all one way, and it clearly shows by an overwhelming preponderance that appellant's position is right. To illustrate: The commodity bagasse will go to water transportation. Petroleum products and asphalt will go to trucks, at it is well on the way now. Sand and gravel will go to trucks; sugar and sugar cane, to trucks; sulphur and sulphuric acid, to water transportation.

The sworn testimony of the shippers themselves, those who are in charge of routing the traffic, is so overwhelming, that there is no substantial evidence to the contrary. This evidence shows that the shippers intend and will transfer the freight involved on the excepted commodities to motor and water transportation; that the cost, when the additional rate increases are granted, is so great that these commodities can no longer economically stay on rail.

We shall not burden the court in its consideration of this motion to affirm with an extensive review of the evidence. However, solely to illustrate the substantial evidence not considered by the District Court which conclusively indicates the diversion of freight from rail to other modes of transportation and loss in railroad revenue,

rather than an increase, which would result from the rate increases here involved, we desire to refer to the uncontradicted facts shown by the record as to two of the commodities, sugar and sugar cane. The following table compiled from the record indicates this diversion and loss of railroad revenues that will result from these rate increases.

Shipper		Loss in Raw Sugar Freight Revenue	Loss in Sugar Cane Freight Revenue
St. Mary Sugar Coop.	(Bolin, Tr. 644-645)	$ 50,000.00	
A. Wilbert's Sons	(Wilbert, Tr. 680)	32,159.00	
Milliken & Farwell	(Farwell, Tr. 627-628)	12,000.00	$ 18,000.00
Glenwood Coop.	(Melancon, Tr. 649-650)	26,800.00	15,034.00
Godchaux Sugars	(Winter, Tr. 743)		61,000.00
Helvetia Coop.	(Dornier, Tr. 674)	6,801.00	
Poplar Grove	(Wilkinson, Tr. 656-659)	22,324.00	11,223.54
Catherine Sugar Co.	(Carruth, Tr. 661)	26,000.00	
Alma Plantation	(Stewart, Tr. 665-666)	25,000.00	9,000.00
Louisiana State Pen.	(Stroud, Tr. 671)	16,500.00	
Cinclare Factory	(McNeil, Tr. 677)	33,000.00	43,000.00
Total loss 11 Shippers		$250,584.00	$157,257.00
Carriers assumed maximum increase in revenues from all sugar and sugar cane shippers, if no diversion results from rate increases, based on the Railroads' Exhibit No. 4		$107,721.00	$ 81,534.00

It was these facts shown in the above table which led the members of the Interstate Commerce Commission who dissented from the majority report to say, through Commissioner Clarke, who wrote the dissenting opinion:

> *". . . the only conclusion to be drawn from the overwhelming testimony before us is that increased charges as proposed on sugar and sugarcane would precipitate diversions to other forms of transportation in such proportions that the respondents' revenues from this traffic would be less than it is now.*
>
> 'Witnesses representing 11 of the 53 Louisiana sugar-producing mills testified that definite decisions had been made by their respective companies to divert from rail to truck all or some substantial portion of their sugar and sugarcane traffic, if the proposed increases are authorized. *Without considering the diversions reasonably to be expected from the other 42 mills, the probable loss of railroad revenues from those mills for which there was specific testimony far exceeds the total additional revenues the railroads would receive from the proposed increases.*" (Emphasis ours).

The familiarity with local conditions which the Louisiana Public Service Commission has should not be underestimated. The Commissioners themselves heard this case, whereas the Interstate Commerce Commission examiner heard the evidence upon which it predicated its decision. The Louisiana commissioners are thoroughly

familiar with local conditions, and after a full, fair and complete hearing determined that they would grant all less-carload freight increases established under *Ex Parte* 175, also many of the carload increases with the exception of those on the commodities named in its order. The Louisiana decision was not based on caprice or lack of reasoning, it was based on information, upon evidence, and upon the peculiar knowledge of Louisiana's internal economic affairs, which placed the members of the Commission in a better position than an examiner from Washington to analyze the facts.

4.

The issues are substantial, as a reading of this reply will reflect. The Mississippi decision of the three-judge court on a record very similar to the present one, with the commodities almost identical, will undoubtedly soon be before this court, for it certainly may be expected that the railroads and the Interstate Commerce Commission and the United States will appeal. We trust the court will bear in mind the great similarity between this and the Mississippi decision in which the district court granted a permanent injunction against the Interstate Commerce Commission.

CONCLUSION.

The motions to affirm reply almost exclusively rely on the rule stated in said motions, that an administrative board's decisions may be justified by its informed judg-

ment on matters within its special competence. The motions stress the statement in the district court opinion that it was necessary for the Interstate Commerce Commission in reaching its conclusion to weigh the evidence and that this was peculiarly a function which addressed itself to the expertise of the Commission.

There is very little in this case which involves technical rate structures or other matters which peculiarly address themselves to the expertise or technical knowledge of the Interstate Commerce Commission. The most significant question involved here is the diversion of traffic and loss of revenues which the proposed increases in rates will bring. The determination of this question does not involve technical skill of the Interstate Commerce Commission, and is best determined by knowledge of local conditions which the members of the Louisiana Public Service Commission have, as expressed in their decision in this case.

The importance of the present case to the ratepayers of Louisiana cannot be too greatly estimated. It is important to the economy of our state. It is a big case so far as Louisiana is concerned. Accordingly, it is respectfully hoped that the Commission will afford an opportunity to appellants to present oral argument in order that all of the issues involved may be adequately presented to the court, and that after a review of the record as a whole it may be found that there is no substantial evidence upon

which the Interstate Commerce Commission decision can be based sufficient to predicate its decision.

Respectfully submitted,

FRED S. LeBLANC,
Attorney General, State of Louisiana;
JOEL B. DICKINSON,
Assistant Attorney General,
State of Louisiana;
ROBERT A. AINSWORTH, JR.,
Attorney for Louisiana Public Service Commission, Appellant;
W. CROSBY PEGUES, JR.,
For the Department of Highways, State of Louisiana, Intervening Plaintiff;
PAUL G. BORRON, JR.,
For American Sugar Cane League of the U. S. A., Inc., Intervening Plaintiff;
LOUIS A. SCHWARTZ,
For New Orleans Traffic and Transportation Bureau and American Turpentine and Tar Company, Intervening Plaintiffs, and American Sugar Cane League of the U. S. A., Inc., Intervening Plaintiff.

By:.....
ROBERT A. AINSWORTH, JR.,
1650 National Bank of Commerce Bldg.,
New Orleans, Louisiana,
Attorney.

CERTIFICATE OF SERVICE.

I hereby certify that a copy hereof has been duly served on all parties of record in the manner and form required by the rules of this court.

.....
ROBERT A. AINSWORTH, JR.

APPENDIX I.

THE MISSISSIPPI LOWER COURT DECISION IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

Mississippi Public Service Commission,
Plaintiff

Vs. Civil Action
No. 2120

The United States of America and
The Interstate Commerce Commission,
Defendants

OPINION.

MIZE, J.

This is an action seeking to annul, set aside, and permanently enjoin enforcement of an order of the Interstate Commerce Commission entered February 1, 1954, in accordance with the report findings and conclusions entered November 2, 1953, in the proceeding No. 31164, *Mississippi Intrastate Freight Rates and Charges*, under which the respondent rail carriers operating in Mississippi were required to establish intrastate freight rates and charges in Mississippi no lower than the rates and charges prescribed and provided for in said report. The action was filed by the Mississippi Public Service Commission against the United States and the Commission, and served upon the Commission March 15, 1954. Answers have been filed by the United States, by the Commission, and railroad respondents operating in Mississippi. Certain shippers and associations, as named in the several mo-

tions, have intervened in support of the Mississippi Commission. The case was heard on its merits and upon an application for a temporary injunction by consent at the same time. The temporary injunction was granted pending a final judgment.

The Commission proceedings were instituted October 17, 1952, upon the filing of a petition by seventeen railroads, with a supplemental petition filed November 21, 1952, seeking an order, after investigation, to authorize increase of intrastate freight rates in Mississippi, to the same extent and in the same manner as authorized by the Commission in respect to interstate rates and charges, in Ex Parte No. 175, *Increased Freight Rates*, 1951, 284 I. C. C. 589, hereinafter referred to as X-175. The railroads had, prior to filing petitions with the Commission, filed petitions with the Mississippi Commission, seeking approval of the increased rates, which were denied by order of that Commission, entered November 8, 1952. By order of December 5, 1952, Division 1 of the Commission ordered such investigation and a hearing before an examiner for February 2, 1953, at Jackson, Mississippi.

After the hearing a report by Examiner Vandiver was filed and served on May 27, 1953. The proposed report found that the intrastate rates imposed by the Mississippi Commission on cottonseed and products thereof, soy beans and products thereof, fertilizer and fertilizer materials, lumber and articles listed as taking the lumber rates, pulpwood, sand and gravel, cement, brick and related articles in the brick list, and refined petroleum in tank cars, were abnormally low, and traffic thereunder fails to produce its fair share of revenue to enable railroad respondents to

provide adequate and efficient service, and such rates cause undue, unreasonable, and unjust discrimination against interstate commerce. The Mississippi Commission and three protestants filed exceptions to said report, and respondent railroads filed reply thereto.

The Commission entered its report on November 2, 1953, 291 I. C. C. 39. Ultimate findings of the Commission are set forth in the report and are substantially the same as those proposed by the Examiner. The report provided that an order would be issued making the findings effective, unless notified within 30 days after service, by the Mississippi Commission, that it would promptly permit the approved increases. Upon petitions of the Mississippi Commission, the Commission, by orders dated November 25 and December 23, 1953, extended the date on which such notification should be given to February 1, 1954. The Mississippi Commission and three protestants filed petitions for reconsideration of the report of November 2, 1953, which were denied by the Commission order of February 1, 1954, under which respondent railroads were ordered to establish the intrastate rates prescribed for the commodities named in the report, on March 19, 1954, effective upon five days' notice. Petition of the Mississippi Commission was filed March 9, 1954, to amend the order of February 1, 1954, so as to remove therefrom the requirement to increase intrastate rates on refined petroleum in tank cars. By Commission order of March 10, 1954, the order of February 1, 1954, was so amended.

The Commission authorized, in X-175, a general increase of fifteen percent on basic interstate freight rates and charges, subject to certain exceptions and modi-

fied increases, which was the fourth general increase since World War II. The railroads operating in Mississippi filed petition with the State Commission, seeking the same increases on intrastate rates and charges as authorized on interstate rates under X-175.

The Mississippi Commission had a full hearing and authorized an increase in intrastate rates and charges of the full fifteen per cent on all less than carload freight and upon all carload freight, except as to carload line haul rates of brick and related articles upon which the Mississippi Commission granted no increase, cement, upon which the Mississippi Commission granted no increase, fertilizer and fertilizer materials, upon which the Mississippi Commission authorized a six per cent increase, lumber, upon which the Mississippi Commission authorized a six per cent increase, pulpwood, upon which the Mississippi Commission authorized a six per cent increase, sand and gravel, upon which the Mississippi Commission granted no increase, cottonseed and products thereof, upon which the Mississippi Commission authorized a six per cent increase, soya beans and the products thereof, upon which the Mississippi Commission authorized a six per cent increase, cattle feed made 65% or more of cotton seed or soya bean products, upon which the Mississippi Commission authorized a six per cent increase, and refined petroleum in tank cars, upon which the Mississippi Commission authorized an increase of six per cent. Upon all of the commodities excepted the increase authorized by the Interstate Commerce Commission was fifteen per cent with the single exception of sand and gravel upon which the interstate increase was twelve per cent.

Cattlefeed made 65% or more of cottonseed or soya bean products is not involved in this case as same was excepted from the report and order of the Interstate Commerce Commission. Refined petroleum in tank cars is likewise not involved in this proceedings for the reason that, by order dated February 23, 1954, the Mississippi Commission ordered that the intrastate rates for that commodity be increased the full fifteen per cent authorized in Ex Parte No. 175. All of the remaining excepted commodities are in issue, there being involved the differential in the increases authorized by the Mississippi Commission and the Interstate Commerce Commission as outlined above.

The Commission report, finding 3, prescribed the interstate increase on all the commodities excepted by the Mississippi Commission. The rates involved herein relate only to said excepted commodities as an issue, of which refined petroleum in tank cars was removed by the Commission order of March 10, 1954, entered after the Mississippi Commission had approved the interstate increase for that commodity.

The ultimate issue relates to the validity of the orders of the Commission requiring the rail carriers to increase their Mississippi *intrastate* rates and charges to the same level prescribed in the report of November 2, 1953. Section 13 (4) prohibits two types of preference and discrimination, in respect to intrastate and interstate rail rates, preference and prejudice as to persons and localities, and discrimination against interstate commerce. The Commission report of November 2, 1953, found that no evidence was offered as to undue prejudice to inter-

state shippers. The remaining issue relates only to discrimination against interstate commerce. Paragraphs XII and XIII of the complaint allege illegality of the final report and order of the Commission, on grounds there stated of violation of constitutional rights; action beyond the scope of statutory authority; unsupported by substantial evidence or contrary to evidence; and arbitrary action.

The paramount question for determination is whether or not there was substantial evidence to support the finding of the Commission. The law in recent years has been fully announced and declared by the Supreme Court.

The Interstate Commerce Commission has no general authority to regulate intrastate rates. The mere existence of a disparity between interstate and intrastate rates does not authorize the Commission to enter a field properly consigned and belonging to the state regulatory body and interfere with rates established by state authority. Section 13 (4) of the Interstate Commerce Act does not automatically require complete uniformity in intrastate and interstate rates but the state commission may fix a lower intrastate rate than the interstate rate, unless an undue advantage to intrastate traffic and an unfair discrimination against interstate traffic results therefrom. This rule was properly and clearly declared by the Supreme Court of the United States in the case of North Carolina v. United States, 65 S. Ct. 1260, 325 U. S. 507, 89 L. Ed. 1760.

The true rule is that, whenever the Commission attempts to exert the power to interfere with intrastate

rates which are otherwise in the dominion of state regulation, the justification for the exercise of such power by the Commission must clearly appear of record. Otherwise, the Commission's action is a clear and unlawful encroachment upon the reserved power and authority of the state.

In order to authorize the Commission to exercise the power to nullify intrastate rates under Section 13 (4) of the Act, it must be shown, among other things, (a) that the intrastate rates involved are abnormally low and are not contributing their fair share of the revenue of the carriers involved; (b) that the disparity between the rates is substantial and operates as a real discrimination against and obstruction to interstate commerce; (c) that injury to interstate shippers has resulted and will continue to result because of the disparity in rates; (d) that the proposed rates are just and reasonable; and (e) that a substantial increase in the carriers' revenue will result from the proposed increase in the intrastate rates. North Carolina v. United States, supra. The Court further held in that case that the power of the Commission to require states to raise their intrastate rates depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operation costs and to yield a fair return on the value of the property directed to the transportation service both interstate and intrastate. Moreover, it reaffirmed the doctrine that the Commission could not require intrastate rates to be raised above a reasonable level.

The Interstate Commerce Commission is granted wide powers to prescribe rates on interstate freight as well as other transportation matters. That function be-

longs primarily and exclusively within the limits of the Act to the Commission; however, its authority over intrastate rates is limited as above set out and Section 13 (4) of the Act was never intended to deprive the state commission of their primary authority to regulate intrastate rates. There is a point where the power of the state commission ceases and the power of the Interstate Commerce Commission begins, but as stated by Mr. Justice Black in the North Carolina case, it is not always easy to designate that point.

Other principles of law have been clearly declared by the Supreme Court of the United States. Intrastate traffic must bear a fair proportionate share of the costs of maintaining an adequate railway system. Wisconsin Railroad Commission v. Chicago V. & Q. Railway, 257 U. S. 563. It is within the power of the Interstate Commerce Commission to determine if the intrastate rates do that; however, before it can alter intrastate rates the justification therefor must clearly appear and be supported by substantial evidence. It is not sufficient that there be simply a difference between interstate rates fixed by the Commission and the intrastate rates as fixed by the state commission. The fixing of intrastate rates is primarily the duty of the state commission and the record in this case demonstrates that the Mississippi Commission gave great study and investigation and heard much testimony before the commission itself and not through an examiner. If the evidence is substantial to support the finding of the Interstate Commission, then its powers and its conclusions override that of the state commission, but a mere disparity of itself in the rates fixed by each com-

mission is not sufficient. Florida v. United States, 282 U. S. 194. Whenever the findings of the Commission are supported by substantial evidence, then the findings of such commission are conclusive upon the courts, but if such findings are not supported by substantial evidence, then the matter is one for the court to determine and such order cannot be upheld. In determining in the first instance whether intrastate rates should be raised or lowered the Interstate Commerce Commission is allowed wide latitude in directing that intrastate rates be increased and may take into consideration material and reports which were before the Commission in previewing a nationwide increase in interstate freight rates. The Commission's jurisdiction over intrastate rates is not limited to cases where those rates are confiscatory. King, et al. v. United States, et al., 344 U. S. 254.

The Court in reviewing an order of the Interstate Commerce Commission has the duty to study the entire record and it is the function of the Court to determine from the whole record whether or not there was substantial evidence before the Commission upon which its order could be based. If there were no substantial evidence then it is the duty of the Court to set aside such order and enjoin its enforcement. Congress in enacting in 1946 the Administrative Procedure Act made it mandatory that the reviewing court should set aside an order that was unsupported by substantial evidence and that it should review the whole record in making the determination. The Supreme Court of the United States in Universal Camera Corporation v. N. L. R. B., 340 U. S. 474 held that in determining what is substantial evidence that the Court must take into consideration whatever in the

record fairly detracts from its weight. Under the decision in that case it is the duty of the reviewing court when it cannot conscientiously find that the evidence supporting the order of the Commission is substantial, when viewed in the light that the record in its entirety furnishes, including the body of the evidence opposed to the Board's view, to set aside the order of the Commission.

Substantial evidence is a legal term and presents to the court for adjudication a question of law. It is a term that frequently appears in the construction of many laws. There are many instances in which judgments are required to be supported by substantial evidence. The verdicts of juries in some states are required to be supported by substantial evidence and it then becomes a question for determination by the court as to whether or not a verdict is supported by substantial evidence and if it is not, then the court reverses and directs that judgment be entered when not supported by substantial evidence. The decisions on this matter are numerous. See Words and Phrases, Permanent Edition, Vol. 40, 1954 Annual Pocket Part, P. 88. Substantial evidence is a term that cannot be defined definitely, but whether the evidence in a particular case amounts to substantiality must be determined from the facts of each case as it arises.

The order in this case when viewed in the light of the entire record and all of the circumstances leading up to its passage and giving weight to all things that detract from the sufficiency of the evidence is not supported by substantial evidence and must be set aside and its enforcement enjoined. It is a delicate duty placed upon the reviewing court to determine the line of demarkation and

to adjudicate the point where the authority of the state commission ends. The court does not have the power to settle disputes in the testimony, but it must consider the entire record and determine as a matter of law if there was substantial evidence to support the order. The record shows that in making the investigation for the nation as a whole in Ex Parte No. 175 that the Commission at that time was making a determination that the intrastate rates should be increased as well as the interstate rates. That will not do. There must be a finding based upon substantial evidence after a full investigation that the intrastate rates are abnormally low and that traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of intrastate commerce. The record does not bear out any substantial evidence to this effect. There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations. So far as the record shows, it could be fairly assumed that the rates fixed by the Mississippi Commission were not abnormally low but were bearing a fair per centage of revenue for the operation of the carriers. The record of the evidence in the case reflects a favorable financial condition of the railroads involved herein when contrasted with that of the railroads of the country as a group. The statistics introduced in evidence and reflected by the various reports show that the national average of returns for the railroads was 4.02 per cent; whereas, the condition of the railroads involved in this controversy was in a better financial situation and their earnings greater than the 4.02 per cent. The Interstate Commerce Commission in Ex Parte No. 175, when granting freight rate increases took into consideration the losses sustained by the rail-

roads in passenger operations. This was correct and was upheld in King v. United States, 344 U. S. 254, but in determining the intrastate rate in Mississippi the Commission refused to take into consideration the lower passenger deficits which prevailed in Mississippi. There is no testimony in the record having probative force showing that the rates in Mississippi were abnormally low other than the disparity that exists between the interstate rates and the intrastate rates which within itself is not sufficient. Different conditions, circumstances and situations in different states require and justify different results in fixing intrastate rates. The findings of a state commission which is familiar with such conditions in the state, with the location of competing highways and other forms of carriers, when its opinion differs from the Interstate Commerce Commission's findings detracts heavily against the findings of the Interstate Commerce Commission, whose testimony is taken before an examiner. The record shows in this case that the need of the carriers involved here for additional revenue is not as great as the needs of the railroads of the country as a whole. The statistics introduced in evidence and now in the record demonstrate this.

The testimony of the various witnesses who are shippers of many of the products involved herein demonstrates that if the rates are permitted to stand as fixed by the Interstate Commerce Commission, the income of the railroads will be reduced rather than increased. Many of these are shippers themselves and testified positively and unequivocally that it would be economy for them to use their own individual trucks or private carriers by truck, who are unregulated so far as rates are con-

cerned in Mississippi. When the intrastate freight rate level on a given commodity is at such level that any increase in the rate would have the effect of diverting traffic from the rail carriers to competing forms of transportation, then it would follow that the revenue derived would be diminished rather than increased. In fixing reasonable rates competition is one of the elements to be considered and is frequently controlling. See *Interstate Commerce Commission v. Great Western Railway Company*, 141 Fed. 1003. In determining the legal question as to whether the evidence amounts to substantiality and in adjudicating whether there was substantial evidence or not, the court likewise must weigh such factors. The record shows in this case that the Mississippi Commission was thoroughly familiar with the competition prevailing and with the location of the sites for gravel, the location of the highways and as a matter of fact, in better position to determine the effect of competition upon the carriers than is the Interstate Commerce Commission, but, of course, its findings must yield to those of the Interstate Commerce Commission, if the record as a whole shows that there was substantial evidence.

The Interstate Commerce Commission found that the increase granted in the rates by it would produce more than $550,000.00 annually on all of the commodities involved. This finding was based upon estimates made by experts of the railroad companies that such revenue would be produced if the rate increase be given. The testimony upon this proposition is exceedingly weak. It is based upon the presumption that the same amount of freight traffic would continue under the increased rate as had theretofore been carried at the lower rate. This assump-

tion and opinion is contrary to the sworn testimony of those who were in position not only to know but also to control large quantities of the products upon which the rate was increased. The evidence to support this finding when weighed in the light of the prevailing rule of law is not sufficient to amount to substantial evidence.

The testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests has not been overlooked but their testimony has been fully weighed in the light of the entire record and proceedings in this cause and when viewed in this light the testimony fails to show substantiality sufficient to uphold the order here under attack and the findings that were made by the Interstate Commerce Commission. It would unduly prolong this opinion to undertake to point out in detail the testimony of the various witnesses and the things that detract from the substantiality of the evidence, but it is demonstrated more closely with reference to sand and gravel, the pulpwood and the fertilizer and cement that is involved. The record is clear in this case that the revenue needs of the railroads of the Eastern District and in the South or Western District and the financial condition of the petitioning railroads involved in this case are in better condition than the national average.

On the trial before this Court there was introduced in evidence Plaintiff's Exhibit 4, which was a petition by the railroads made to the Interstate Commerce Commission seeking a modification of the Commission's order so as to authorize lower rates upon sand and gravel and Plaintiff's Exhibit 5, being an order thereon granting the

BLEED THROUGH POOR COPY

prayer of the petition. There was no objection to the introduction of these documents but even if they should have been irrelevant as having occurred since the filing of the suit, it still would be true that there was not sufficient substantial evidence to support the order but if these documents be considered, they simply demonstrate that the higher rate given the railroads would cause the traffic to divert to competitors. The commodities involved in this controversy require shorter hauls than do the interstate shipments and are therefore more susceptible to competition. On all of the commodities involved in the controversy the competition by carriers is keen and would come not only from regulated trucks for hire but from unregulated trucks and from trucks owned and operated by the shippers themselves. This is clearly shown by the record by positive testimony and overwhelmingly overthrows and overrides the opinions of the experts.

The Interstate Commerce Commission committed an error of law in disregarding the evidence that passenger deficits in Mississippi were substantially lower than in the South or the nation as a whole. The Mississippi Commission offered evidence showing that passenger deficits in Mississippi were substantially less than the passenger deficits of the same railroads for their systemwide operation and according to the statistics introduced there was a vast difference. Passenger deficit is an element to be taken into consideration in rate making by the Interstate Commerce Commission, and as a matter of law, it is the duty of that Commission to consider it in determining whether rates should be increased or decreased, and if the passenger deficit in Mississippi was less than that of the nation as a whole, it was the duty of the Com-

mission to give proper consideration to this testimony. *King v. United States*, supra.

At the time the original complaint herein was filed and at the time of the hearing and when the case was submitted to the Court for judgment, cement in carload lots was one of the commodities involved and an intervention by the Marquette Cement Manufacturing Company was allowed but since that date the Marquette Cement Manufacturing Company, one of the intervening plaintiffs, moved to be permitted to withdraw its intervention for the reasons stated in the motion and likewise the plaintiff moved to amend its complaint so as to eliminate cement from the commodities at issue and without objection an order was entered on the 13th day of September, 1954, sustaining each of said motions. The complaint was amended so as to eliminate cement and the petition of the Marquette Cement Company was dismissed for the reasons stated in said motions, there being no objections from any one to these motions.

For the reasons herein stated the order of the Interstate Commerce Commission will be set aside and its enforcement enjoined.

Order may be drawn in accord herewith.

Jackson, Mississippi, September 21, 1954.

/s/ E. R. HOLMES
United States Circuit Judge

/s/ S. C. MIZE
United States District Judge

United States District Judge

BLEED THROUGH POOR COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

MISSISSIPPI PUBLIC SERVICE COMMISSION,

Plaintiff

Civil Action No. 2120

VS.

THE UNITED STATES OF AMERICA
and
THE INTERSTATE COMMERCE COMMISSION,

Defendants

OPINION

Thomas, District Judge, dissenting:

As stated by Judge Mize in the majority opinion, the paramount question for determination is whether or not there was substantial evidence to support the finding of the Commission. The law is well settled "that an order of the Commission is entitled to finality, and may not be set aside, modified, or disturbed on judicial review, if such order of the Commission lies within the scope of the Interstate Commerce Statute, and is based upon adequate findings that are supported by substantial evidence."(1) There is no question but that the order of the Commission lies within the scope of the statute. In discussing the limitation upon the right of courts to review orders of the Commission, in the case of *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 541, 56 L. Ed. 308, 32 S. Ct. 108, the court said:

(1) Louisiana Public Service Commission vs. United States of America and the Interstate Commerce Commission, U. S. District Court, Eastern District of Louisiana, decided July 9, 1954.

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' Ill. Cent. v. I. C. C., 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In my opinion, the findings made by the Commission in support of its conclusion are entirely adequate, and fulfill the needs emphasized in the case of *North Carolina et al. v. United States et al.*, 325 U. S. 507, 89 L. Ed. 1760, 65 S. Ct. 1260.

The record must be considered as a whole. I have considered the record as a whole and am of the opinion that on the authority of *King, et al. v. United States, et al.*, 344 U. S. 254, 97 L. Ed. 301, 73 S. Ct. 259, the order complained of has a rational basis in adequate findings, which are supported by substantial evidence.

I respectfully dissent from the majority opinion.

/s/ DANIEL H. THOMAS

BLEED THROUGH POOR COPY

APPENDIX II.

UNIVERSAL CAMERA CORP. PURSUED THROUGH SHEPARD'S CITATIONS

In *National Labor Relations Board v. Hart Cotton Mills*, 109 F. (2d) 964, 974 (4th Cir., 1951), the Court said, "We are *warned* by the decision of the Supreme Court in *Universal Camera Corp.* . . ." that under the provisions of the Administrative Procedure Act courts must now assume more responsibility for the reasonableness of the decisions of an administrative tribunal. The Court reviewed the evidence and held that it did not establish that the corporation was guilty of unfair labor practices. Accordingly the petition of the N. L. R. B. was dismissed *on the evidence*, which was found not substantial considering the record as a whole. (Emphasis ours).

In *National Labor Relations Board v. Russell Mfg. Co.*, 191 F. (2d) 358, 359 (5th Cir., 1951), the court did not hesitate to weigh the evidence and to find that the evidence with regard to whether certain employees were discriminatorily discharged was not circumstantial when viewed in the light that the record in its entirety furnishes, including the bulk of evidence as opposed to the Board's view.

In *National Labor Relations Board v. Red Spot Electric Co.*, 191 F. (2d) 697, 699 (9th Cir. 1951), the court in declining to issue a summary order on behalf of the N. L. R. B., said that, "In any event, it has not been held that the amendments of the Act *required a stricter rule of construction than hitherto* and that the *courts have*

a much broader sphere of action in determining what orders are to be enforced." (Citing *Universal Camera Corp.).* (Emphasis ours).

In *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, 191 F. (2d) 786, 789 (7th Cir., 1951), the court cited *Universal Camera Corp.*, supra, and refused to uphold the decision of the Federal Trade Commission, stating, "We are convinced that here 'the inferences on which the . . . findings were based were so overborne by evidence calling for contrary inferences that the findings . . . could not, on the consideration of the whole record, be deemed to be supported by 'substantial evidence'." The court also said, "The evidence supporting the conclusion may become even less substantial when it fails to persuade an experienced member of the Commission, who dissents from its findings and conclusions."(1)

In *Whiting Corp. v. National Labor Relations Board*, 200 F. (2d) 43, 45 (7th Cir., 1952), the court weighed the evidence and found it insufficient to sustain the findings of the N. L. R. B. The court said, "We think the conclusion inescapable that the Board failed to give to the evidence that consideration required by *N. L. R. B. v. Universal Camera Corp. . . .*"

In *Securities & Exchange Commission v. Cogan*, 201 F. (2d) 78, 86 (9th Cir., 1952), the court declined to follow an order of the Securities and Exchange Commission, and said that the power of reviewing courts as to

(1) In the instant case Commissioner Freas dissented from the entire report. Commissioner Clark dissented in part as to sugar and sugar cane and was joined in this dissent by Commissioners Alldredge and Knudson.

BLEED THROUGH POOR COPY

administrative decisions had been "reinforced" by the adoption of the Administrative Procedure Act.

In *National Labor Relations Board v. Southland Mfg. Co.*, 201 F. (2d) 244, 250 (4th Cir., 1952), the court weighed the evidence and held that it failed to sustain the Board's findings. The court cited with approval *Universal Camera Corp.*, supra, and said, "By this decision the Supreme Court in effect overruled decisions of the Courts of Appeals of this and four other circuits, which were in agreement that the two statutes had made no material change in the reviewing power." And the court further said:

> "Specifically we may not say that the findings of fact of the Board must be sustained unless the supporting evidence is so weak that we would direct a verdict if the case had been tried by a jury; and we may not say broadly that it is beyond our power to inquire whether the findings are so clearly erroneous that an injustice has been done, or that we are not permitted in any case to substitute our judgment for that of the Board.
>
> "True it is that the judgment of the Board is entitled to respect, and weight must be given to its expertness in its specialized field and we may not try the case de novo or displace the Board's choice between two fairly conflicting views; yet we must exercise our independent judgment and substitute it for that of the Board's if it is clear to us that the Board has not made a fair estimate of the worth of the testimony or we cannot conscientiously find that the supporting evidence is sub-

stantial when viewed in the light supplied by the entire record, including the evidence opposed to the Board's view."

In *National Labor Relations Board v. England Bros., Inc.*, 201 F. (2d) 395 (1st Cir., 1953), the court found after weighing the evidence that it was insufficient to sustain a finding that the employer had engaged in any course of coercive interrogation of employees in connection with their union activity, and on the basis of *Universal Camera Corp.*, supra, dismissed the N. L. R. B. petition.

In *National Labor Relations Board v. Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 127*, 202 F. (2d) 671, 674, (9th Cir., 1953), the court found from the evidence that it was insufficient to sustain findings that the union was guilty of unfair labor practices, and on the basis of *Universal Camera Corp.*, supra, declined to uphold the Board's findings because it said, ". . . we cannot find that the record as a whole furnishes substantial evidence to support the . . . findings."

In *National Labor Relations Board v. American Mfg. Co. of Texas*, 203 F. (2d) 212, 217 (5th Cir., 1953), the court declined the petition of N. L. R. B. by weighing the evidence and finding therefrom that certain employer practices did not constitute unfair labor practices. On the authority of *Universal Camera Corp.*, supra, it found that the order of the Board should be denied enforcement, as not supported by substantial evidence on the record considered as a whole.

BLEED THROUGH POOR COPY

In *National Labor Relations Board v. Corning Glass Works, et al.*, 204 F. (2d) 422, 427 (1st Cir., 1953), the court held that the act of supervisor in handing cards of a particular union to a worker, even if attributable to employer, constituted such trivial support of such union over competing union that employer was not chargeable with having contributed support other than financial to the union thus favored. Viewing the record as a whole under the rule of *Universal Camera Corp.*, supra, it found that there was no room for holding as the Board had done under the facts.

In *National Labor Relations Board v. Stafford*, 206 F. (2d) 19, 22 (8th Cir., 1953), the court said, "The insertion of the word 'substantial' in the Act by the amendment of 1947 did not, therefore, enlarge its meaning in that respect, but the insertion of the words, 'on the record considered as a whole' and the historical background of the Act and the amendment do have significance, at least under the present record."

In *National Labor Relations Board v. Reed*, 206 F. (2d) 184, 189 (9th Cir., 1953), the court did not hesitate to modify the Board's findings or to say that, "An examination of the record as a whole fails to disclose substantial evidence to support the Board's finding on this point."

In *National Labor Relations Board v. Fuchs Baking Co.*, 207 F. (2d) 737, 739 (5th Cir., 1953), the Court held that the evidence was insufficient to support findings that superintendent's questioning of employee concerning union membership and activities constituted interference,

restraint and coercion and that employer discriminatorily discharged two employees. Citing *Universal Camera Corp.*, supra, the court said: "With no evidence of anti-union animus, it seems to us the circumstances relied on by the Board are enough merely for suspicion or surmise, and do not amount to substantial evidence on the record considered as a whole."

In *Farmers Co-operative Co. v. National Labor Relations Board*, 208 F. (2d) 296, 298 (8th Cir., 1953), 299, the court declined to sustain the Board, holding that the record considered as a whole disclosed no substantial evidence to support findings of violation by plaintiff of unfair labor practice provisions. The court, citing *Universal Camera Corp.*, supra, said: "The goal to achieve in reviewing the whole record is to make 'a rational inquiry into truth' for the purpose of judicially administering justice according to law."

In *National Labor Relations Board v. Associated Dry Goods Corp.*, 209 F. (2d) 593, 595 (2nd Cir., 1954), the court held that the evidence was insufficient to sustain the Board's findings that employer had threatened its employees with loss of benefits in event of unionization and had exercised coercion to restrain activities of union organizer. The court said, ". . . it is sufficient to say that the evidence as a whole lacks the required substance to afford a basis for the order of the Board. . . ."

In *National Labor Relations Board v. International Broadcasting Co.*, 209 F. (2d) 912 (5th Cir., 1954), the court declined to enforce an order of N. L. R. B. entered against employer allegedly guilty of discouraging forma-

BLEED THROUGH POOR COPY

tion of union, who discharged two men because of union activity and refusal to bargain. The court said that the evidence demonstrated that the employer had just cause to discharge the employees, and that in so doing it was not guilty of an unfair labor practice. As the court stated, "We place our decision on the ground that the evidence shows clearly that the employer had just cause to discharge these employees."

In *Gooding v. Willard*, 209 F. (2d) 913, 916 (2nd Cir., 1954), the court cited with approval *Universal Camera Corp.*, supra, and said:

> "As is pointed out in the opinion in the last mentioned case, 'substantial evidence' means more than evidence which, considered by itself alone, would be sufficiently persuasive to induce the trier of fact to give it the credence and weight essential to support findings. It must have those characteristics to such an extent that in the setting made by the entire record the trier may reasonably find in accordance with it after giving due consideration to whatever else is shown both in opposition or in accord. Judicial review has been extended by the Administrative Procedure Act to embrace adequate exploration of the record as a whole to enable the reviewing court to arrive at its own judgment in determining that."

In *Local No. 3, United Packinghouse Workers of America, CIO v. National Labor Relations Board, et al.*, 210 F. (2d) 325, 330 (8th Cir., 1954), the court said: "Since the decision of the Supreme Court in *Universal*

Camera Corp. . . . it is incumbent upon this court in cases here on petition for review of an order of the National Labor Relations Board to consider the conflicting evidence and if it is our duty to consider it *then we must pass upon its weight.*" The court declined to enforce the order of the Board after weighing the evidence. (Emphasis ours).

In *Mount Hope Finishing Co., et al. v. National Labor Relations Board,* 211 F. (2d) 365, 371 (4th Cir., 1954), the court said: "After an examination of the evidence which we have set out in much detail we cannot conscientiously find reasonable support for the decision of the Board on this point, 'when viewed in the light that the record in its entirety furnishes, including the body of the evidence opposed to the Board's view', as required by the statute and the decisions of the Supreme Court." (Citing *Universal Camera Corp.,* supra).

In *Texas Foundries, Inc. v. National Labor Relations Board,* 211 F. (2d) 791, 794 (5th Cir., 1954), the court weighed the evidence and held: "The substantial evidence in the record as a whole does not support the board's finding that petitioner failed to bargain with the union in good faith, and we think the order of the board should be set aside" (citing *Universal Camera Corp.,* supra).

In *National Labor Relations Board v. Houston Chronicle Pub. Co.,* 211 F. (2d) 848, 854 (5th Cir., 1954), the court declined to enforce an order of the Board, cited *Universal Camera Corp.,* supra, with approval and said:

BLEED THROUGH POOR COPY

"The Board's view does not fairly conflict with ours, when it is not supported by substantial evidence on the record considered as a whole."

In *National Labor Relations Board v. Philadelphia Iron Works*, 211 F. (2d) 937, 940 (3rd Cir., 1954), the court observed: "Since 'the substantiality of evidence must take into account whatever in the record fairly detracts from its weight,' *Universal Camera Corp.*, . . . we must consider the other side of the coin."